No. 3584

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN C. DAVIS, as Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,
Plaintiff in Error,

vs.

E. T. WILLEY,
Defendant in Error.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

BRIEF FOR PLAINTIFF IN ERROR.

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Statement of Facts.

In the year of 1911 Edward McGinn was the owner of a one-sixth interest in a gold mine in Mariposa County, California. Title to the mine stood in the name of his brother-in-law, Charles F. Willey. Charles F. Willey had given a bond or option on the mine to a prospective purchaser, who developed it and elected to purchase it. In that year

the purchaser paid to Charles F. Willey a part of the purchase price. Edward McGinn demanded of said Willey that he pay over McGinn's one-sixth of the moneys paid, but Willey refused, and denied McGinn's right thereto. McGinn then sued Willey in the Superior Court of Mariposa County, California, to recover McGinn's share of the moneys already paid, and to determine that McGinn was the owner of a one-sixth interest. (Tr. pp. 19, 26, 27.) This action was tried on February 8, 1912, and submitted for decision. Judgment therein was rendered and entered on May 3, 1912, in favor of McGinn and against Charles F. Willey, for $1040 in money, and decreeing that McGinn was the owner of a one-sixth interest in the mine. (Tr. pp. 20, 27.) Between the trial and entry of judgment further payments were made by the purchasers to Charles F. Willey, McGinn's one-sixth thereof amounting to $457.73. (Tr. p. 29.)

Charles F. Willey appealed from the judgment to the District Court of Appeal of California, Third Appellate District. The judgment was affirmed by that court on April 8, 1914, and a petition by Willey to the Supreme Court of California for a rehearing was made, and was denied, and remittitur to the Superior Court of Mariposa County was made on June 8, 1914. (Tr. p. 3.) On June 20, 1914, Charles F. Willey filed his petition in the District Court of the United States, Northern District of California, for voluntary bankruptcy, and was adjudicated a bankrupt. The first meeting

of the creditors was held on April 3, 1915, and John C. Davis, plaintiff herein, was appointed trustee for the creditors. On May 20, 1915, the bankrupt applied for discharge in bankruptcy, and upon objection being made thereto, said District Court, on June 19, 1915, referred the matter to the Referee in Bankruptcy for hearing on the objections. Said hearing took place February 2, 1916. The report of the Referee thereon was filed May 16, 1917, and on May 22, 1917, the petition of the bankrupt for discharge was denied. (Tr. pp. 28, 29.)

On February 26 or 27, 1912, after the trial of the action by McGinn against Charles F. Willey, and pending decision therein, said Willey withdrew from the Hibernia Savings & Loan Society $1294.97; from the Stockton Savings & Loan Society, $1252.02, and from a savings account in a Sonora, California, bank, $840.38, the same being all the moneys and property of which he was possessed, which were exempt from execution, and deposited the same in the First National Bank of Sonora, California, said bank giving therefor a certificate of deposit in the name of C. A. Belli, cashier. C. F. Willey then stated to the assistant cashier of said bank that he desired the deposit to be made so that the money could not be attached. This amount was reduced by $100 on March 13, 1912, a new certificate in the same form and name being issued for $3287.37. On May 28, 1912, Charles F. Willey cashed the certificate of

deposit, and with the proceeds caused to be opened two accounts in the same bank in the name of his brother, E. T. Willey, defendant herein; one a savings account for $1500; the other a "special account" for $1787.37. E. T. Willey had another account in the bank at the same time. (Testimony of Burden and Knowles, Tr. pp. 29-33.) This transfer was made, as the court finds in this action, secretly, without consideration, and with the intent, and for the purpose, of defrauding McGinn out of moneys owed him by Charles F. Willey, and to prevent the enforcement of any judgment which might be rendered in McGinn's favor in the pending action, and with the full knowledge of E. T. Willey of such intent and purpose and consent thereto. (Tr. p. 19.) On October 25, 1913, the savings account, then amounting to $1565, was withdrawn by E. T. Willey. The moneys in the other account were drawn out at various times by E. T. Willey.

In the action by Edward McGinn against C. F. Willey, in the Superior Court at Mariposa County, an execution was issued upon the judgment in favor of McGinn, and levied by William Sweeney, sheriff of Tuolumne County, upon an automobile as the property of Charles F. Willey. The automobile was sold under the execution and the proceeds of the sale, $437.50, credited on the judgment. (Tr. pp. 27-28-29.) Thereafter, E. T. Willey sued the sheriff, Sweeney, in the Superior Court of Tuolumne County, for conversion of the automobile, claiming that he had paid for it, and that it was

his own. This suit against the sheriff was tried on March 14, 1914, J. C. Webster being the attorney for the defendant, Sweeney. On the trial, E. T. Willey was a witness and testified that he had paid for the automobile out of moneys of his own, saved up from his labor, which he had deposited in bank a short time before the machine was purchased, and on which account he had drawn a check to pay for it. (Tr. pp. 37-39.) An officer of the bank on which the check was drawn testified that the deposit was created by a transfer of funds from an account of Charles F. Willey, in February, 1912. (Tr. p. 35.) McGinn was present at the trial. Verdict and judgment went for the plaintiff, E. T. Willey. At some subsequent time, a motion for a new trial was made and granted, but the action was not further prosecuted. (Tr. pp. 27, 28.) At the meeting of the bankrupt's creditors on April 3, 1915, plaintiff was appointed trustee. Upon examination of the bankrupt the facts relative to the transfer of the moneys by the bankrupt to E. T. Willey, as hereinbefore set forth, were learned.

On March 14, 1917, plaintiff herein commenced a suit in equity against Mrs. Charles F. Willey and E. T. Willey, being No. 341 in Equity, United States District Court, Northern District of California, alleging that Charles F. Willey had transferred about $3300 to said defendants in fraud of his creditors, and praying a decree for the payment of such sum to plaintiff and for general relief. In

that suit E. T. Willey made separate answer, setting up that the money alleged to be transferred to him was in payment of a debt then owing to him from Charles F. Willey, and that the plaintiff's remedy against him, if any, was at law, and not in equity. (Tr. Defendant's Exhibit B, pp. 47-52, 54-57.) At the trial of said suit in equity, No. 341, on January 15, 1918, it appeared from the evidence that Mrs. Charles F. Willey had received from E. T. Willey the proceeds of the savings account, $1565. E. T. Willey, Charles F. Willey and Mrs. Charles F. Willey all testified that the moneys paid to E. T. Willey were in payment of moneys previously loaned by E. T. Willey to Charles F. Willey. The court held that Mrs. Charles F. Willey should pay over to the trustee $1565; that E. T. Willey's plea that he had a legal defense and was entitled to a jury trial was good, and the suit as against E. T. Willey was not triable in equity, and decreed payment by Mrs. C. F. Willey accordingly, and dismissed the suit as to defendant, E. T. Willey. (Tr. pp. 61-64.)

The present action at law was commenced March 26, 1918, (Tr. p. 85) against E. T. Willey, to recover the sum of $3387, transferred to him in 1912, as above set forth, by the bankrupt, Charles F. Willey, in fraud of his creditors. A jury trial was waived and the cause heard by the court. On the day of the trial, August 28, 1919, defendant amended his answer to plead the judgment in equity suit No. 341 as a bar to this action. The

court found that said transfer was made to E. T. Willey by the bankrupt in fraud of his creditors, but further found that the decree or order in equity suit No. 341, dismissing that suit as to E. T. Willey, constituted a bar to this action at law. (Tr. p. 22.) The court further found that the action was barred by subdivision 4 of Section 338, Code of Civil Procedure of California, on the ground that Edward McGinn and his attorney had notice from the testimony given on the trial of the suit of *Willey v. Sheriff Sweeney,* more than three years before this action was commenced, of a transfer of moneys by Charles F. Willey to E. T. Willey on the books of the bank sufficient to put McGinn on inquiry as to the fraud complained of in this action. (Tr. pp. 21-22.) Judgment for defendant was entered on the findings, and plaintiff now prosecutes these proceedings in error to this court.

Plaintiff relies upon the particular errors assigned (Tr. pp. 69-70) as follows:

1. The court erred in making its conclusions of law and entering judgment in favor of defendant, and against plaintiff, on the facts as found by the court.

2. The decision was contrary to, and against, law.

3. That the court erred in making its conclusion of law that the action was barred by the order or decree dismissing as to defendant, E. T. Willey, the suit of John C. Davis, trustee, etc., against E. T.

Willey and Mrs. Charles F. Willey, No. 341 in equity, and rendering and entering judgment for defendant thereon.

4. The court erred in finding that the disclosure at the trial of *Willey v. Sweeney* of a transfer on the bank records from Charles F. Willey to E. T. Willey was such as to put Edward McGinn and the trustee, John C. Davis, upon inquiry as to the fraud in said transfer, and erred in making its conclusions of law thereon that the action was barred by the provision of Subdivision IV of Section 338 of the Code of Civil Procedure of the State of California, and in rendering and entering judgment for defendant thereon.

5. The court erred in making its conclusion of law that the action was barred by the provisions of Section 338 of the Code of Civil Procedure of the State of California, and in rendering and entering judgment for defendant thereon because this action is not governed as to limitations by the statutes of California, but only by the provisions of the Bankruptcy Act.

Argument.

The judgment to review which this writ of error is prosecuted was rendered in an action brought under the authority of Section 70(e) of the Bankrupty Act, which section provides, since the amendment of 1905:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided and may recover the property so transferred or its value, from the person to whom it was transferred, unless he has a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value."

The trial court has found on the evidence (Finding II, Tr. p. 19) that the transfer by the bankrupt to the defendant was fraudulently made as against creditors.

THE ACTION IS NOT BARRED BY THE DECREE IN SUIT No. 341 IN EQUITY.

Considering first the third error assigned, the action is not barred by the decree or order in equity suit No. 341 in the District Court dismissing that suit as to defendant, E. T. Willey. In suit No. 341, commenced and tried prior to the commencement of this action, defendant, E. T. Willey, answered separately, setting up a legal defense as follows:

> "Defendant alleges that some time in March, 1912, the exact date of which is now unknown to said answering defendant, said Charles F. Willey paid back certain moneys that he had previously borrowed from answering defendant, but that none of the moneys so paid by said Charles F. Willey to said answering defendant were the moneys received by said Charles F. Willey for said one-sixth interest in said, or any, mining claim, and that all of said

moneys so paid by said Charles F. Willey to said answering defendant were lawfully paid in settlement of legal obligations owing from said Charles F. Willey to said answering defendant." (Tr. pp. 55-56.)

"As a further, separate and distinct defense to said complaint, said answering defendant avers that the said complaint does not state facts sufficient to entitle the said plaintiff to the equitable relief demanded therein, but on the contrary, it appears on the face thereof that said plaintiff has an adequate, legal remedy against said answerng defendant, if he has any remedy at all." (Tr. p. 56.)

After hearing the evidence in this equity suit No. 341, the court found as to these defenses as follows:

"E. T. Willey received from the funds of Mr. Willey, about eight months prior to the time of his filing his petition in bankruptcy, if I remember right, $1787. This was received by him as testified to by him, by Mrs. Willey, and by the bankrupt, Mr. Willey, in payment of advances made by him prior to that time to the bankrupt, Willey. So that the payment of this creditor, if he was a creditor, made prior to the four months' period preceding adjudication, would not under the Bankruptcy Act, be a fraudulent preference. It would be a payment which the bankrupt had a right to make. That indebtedness is a matter which could not be determined in the original bankruptcy proceedings. It would have to be determined in a plenary action where Willey would have a right to have the issue passed upon by a jury." (Tr. p. 64.)

DEFENDANT HAVING SUCCESSFULLY MAINTAINED IN THE EQUITY SUIT THAT HE WAS ENTITLED TO A JURY TRIAL, CANNOT CHANGE HIS POSITION AND THEREBY ESCAPE LIABILITY IN A SUIT AT LAW.

Defendant must be subject to the court either in equity or at law. He pleads and gives evidence in the equity suit that he has a legal defense and the right to a jury trial, and the court thereon sustains his objection to its jurisdiction. Plaintiff then brings suit at law on exactly the same cause of action and in the same court, pleading the same facts and no others. The case comes before another judge of the court. Then on the day of trial defendant amends his answer to plead in bar the very judgment that he sought—the judgment that he could only be sued at law and dismissal thereon.

This he is estopped to do. Having gained the benefit of his contention in the equity suit and escaped being pierced by that horn of his dilemma, he cannot in the law suit claim he gained that benefit wrongfully, that he should have been impaled, and insist that he shall so escape the remaining horn of his dilemma. The law does not permit such shifting of position to enable a party to escape liability.

The Supreme Court has considered and determined this question. In *Wakelee v. Davis,* 156 U. S. 680, it considered a case where a bankrupt had in the bankruptcy proceedings successfully contended that a certain claim and judgment was not affected by the bankruptcy, and would not be dis-

charged thereby, and the claimant had then withdrawn his claim in bankruptcy. In a subsequent suit on the judgment the bankrupt sought to establish that the action was barred by his discharge in bankruptcy. In holding such position untenable, the court said (p. 689):

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

And see authorities therein cited.

THE COURT SHOULD BE HELD BOUND IN THE SUIT AT LAW BY THE RULING IN THE EQUITY SUIT.

The suit in equity and the suit at law, being for the same purpose on the same facts, and the one immediately succeeding the dismissal of the other, are essentially one proceeding. The ruling in the first suit that the remedy was at law should be held binding on the court throughout the proceeding. The rule applied by Judge Field in *Cole Silver Mining Co. v. Virginia Water Co.,* 1 Saw. 685; Fed. Cas. No. 2990, that rulings by one judge of the Circuit Court are not open to review by another judge sitting in the same court and case, should be

applied. That case is cited, and the rule applied in the following cases:

Oglesby v. Attrill, 14 Fed. 214;
Preston v. Walsh, 10 Fed. 316;
Giant Powder Co. v. California Powder Co., 5 Fed. 202.

And the ruling should be applied in the present case, not merely for the reasons given in those cases, but for the greater reason that to refuse to apply it is to deny plaintiff's right altogether.

In *Reynolds v. Mining Co.,* 33 Fed. 354, it is held that a Circuit Judge is bound by the rulings of the District Judge, though the ruling was sought in an independent application, the opinion commenting at length upon the prejudice arising by opposite rulings of different judges in the course of continuing litigation.

Taylor v. Decatur Mineral Co., 112 Fed. 449, and

Meeker v. Lehigh Valley R. R. Co., 175 Fed. 320,

are cases applying the rule.

Defendant in error contended, in the suit in equity, that he had legal defenses. He now contends, in this action at law for the recovery of the same moneys and based on the same facts, that he has no legal defenses and no right to a jury trial; thus would he escape both horns of his dilemma.

THE DECREE, OR ORDER OF DISMISSAL, IN THE EQUITY SUIT IS NOT A BAR TO THE SUIT AT LAW.

For further and different reasons the decree in equity suit No. 341 does not bar this action.

The terms of the decree merely adjudge that the trustee could not proceed in equity over the plea by the defendant of a legal defense, and that the action should be at law. The decree was a denial of the right to take jurisdiction in equity, and a refusal to take such jurisdiction of the suit as against the defendant, E. T. Willey.

If, in suit No. 341, (1) defendant, E. T. Willey, had the right to have the issues presented by his answer tried by a jury, or (2) if plaintiff had a plain, speedy and adequate remedy at law, or (3) if the court had the duty of discretion to leave the plaintiff to his action at law, then the present action at law is properly brought and is not barred by the dismissal in equity of E. T. Willey.

Section 723 of the United States Revised Statutes, enacted in 1789, provides that suits in equity shall not be maintained in the courts of the United States where there is a plain, speedy and adequate remedy at law. This section is merely declaratory, being intended to emphasize the settled rule and impress it upon the attention of courts.

The Supreme Court of the United States in *Buzard v. Houston,* 119 U. S. 351, on page 352, after referring to the enactment of Section 723, says:

"Five days later, on September 29, 1789, the same Congress proposed to the Legislatures of the several States the article afterwards ratified as the Seventh Amendment of the Constitution, which declares that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved'. 1 Stat. at L. 21, 98.

The effect of the provision of the Judiciary Act, as often stated by this court, is that 'Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury' (citing cases). In a very recent case the court said: 'This enactment certainly means something; and if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule, and to impress it upon the attention of the courts" (citing cases).

Accordingly, a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief, in kind or in degree, on the equity side than on the common-law side; as, for instance, by compelling a specific performance, or the removal of a cloud on the title to real estate; or preventing an injury for which damages are not coverable at law, as in *Watson v. Sutherland,* 5 Wall. 74 (72 U. S. bk. 18, L. ed. 580); or where an agreement procured by fraud, is of a continuing nature, and its recision will prevent a multiplicity of suits (citing cases).

In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment

> of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received."

The same court, in *Wehrman v. Conklin,* 155 U. S. 314 (p. 323), in referring to Section 723 says:

> "These provisions are obligatory at all times and under all circumstances and are applicable to every form of action."

To the same effect are:

Grether v. Wright (C. C. A.), 75 Fed. 742, 749;

Warmath v. O'Daniel (C. C. A.), 159 Fed. 87, 89.

The jurisdiction of the Federal Courts as to law and equity is not affected by State statutes or practice.

> "Although the forms of proceedings and practice in the State courts have been adopted by the District Courts yet the adoption of the state practice must not be understood as confounding the principles of law and equity nor as authorizing legal and equitable claims to be blended together in one suit."
>
> *Bennett v. Butterworth,* 52 U. S. 668, 674.

To the same effect are:

Scott v. Neely, 140 U. S. 106;

Peck v. Ayers (C. C. A.), 116 Fed. 273.

THE PLAINTIFF IN SUIT No. 341 HAD AN ADEQUATE REMEDY AT LAW.

It is established that a trustee in bankruptcy may proceed at law against a fraudulent transferee of the bankrupt to recover the property transferred or its value, that law and equity courts have concurrent jurisdiction in fraudulent transfers, and that where there is an adequate remedy at law equity will not assume jurisdiction, but will do so only where the law will not afford adequate relief.

In *Warmath v. O'Daniel* (C. C. A.), 159 Fed. 87, an action by a trustee to recover the value of an alleged preferential transfer of property to a creditor, the defendant objected to the jurisdiction of equity. On appeal the decree for plaintiff was set aside on the ground that the action was at law and the defendant was entitled to a jury trial. We quote from the opinion, page 88:

> "The evidence produced would be, and was in this case, as completely available in an action at law as in a court of equity. No injunction was sought or required. The issue was one which a jury could readily understand and decide under proper instructions from the court in respect to the law. It is suggested that the court must first set aside the transfer before it could proceed to judgment, and that it is the peculiar province of a court of equity to set aside unlawful transfers. This is an ingenious, but unsubstantial figment. No distinct or formal preliminary action was required or contemplated by the statute. If the defendant had obtained part of the estate which should have come to all the creditors, proof of that fact would entitle the trustees to recover it.

Perhaps there may be cases where a declaration of the court may be necessary to completely fulfill all requirements, as where the transfer has been accomplished by a deed or other solemn instrument which may be made matter of record, or is a muniment of title, the existence of which would indicate ownership and the right to sell and convey or mortgage, or do such other things with it as belong to ownership. But in the present case nothing is stated in the bill which makes such a proceeding necessary, nor indeed is anything more required than in any ordinary action at law where the plaintiff is always bound to establish the facts which create the liability, whereupon, and without more, the court gives judgment for the sum he is entitled to recover. And that was what occurred in the present instance. There was no preliminary declaration that this transfer be set aside. The suggestion made would be the adoption of a devise for evading the statute forbidding a resort to a court of equity.

The right of a defendant to have his liability determined in an action at law is a substantial one, the value of which is recognized and protected by the statute (section 723, Rev. St. U. S. Comp. St. 1901, p. 583), which declares that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law'. The defendant is thereby given an opportunity to have his controversy tried by a jury, a privilege of sufficient importance to be secured by the Constitution and guarded by this positive statute."

The opinion then comments further upon the importance and effect of this statutory injunction to the Federal courts to observe the rule and re-

viewing *Miller v. Steele* (C. C. A.), 153 Fed. 714, which involved a trust relation, saying:

> "But it was held that such a circumstance as the existence of a trust was not controlling; that the leading and dominant proposition is that when the capacity of a court of law is sufficient to give a suitable remedy, that is the proper forum in which to try the cause and obtain the proper relief, and said: 'The remedy may be inadequate because the procedure at law is too inflexible to suit the exigencies of the case, or because the relief which a common-law judgment can afford is not adaptable to the particular facts. When neither of these difficulties are in the way, there can be no reason for resorting to a court of equity'."

To the same effect are the following:

20 Cyc., 94;
16 Cyc., 81;
Phipps v. Sedwick, 95 U. S. 99;
Oelrichs v. Spain, 15 Wall. 211;
Wetstein v. Franciscus (C. C. A.), 133 Fed. 900;
Sessler v. Nemcoff, 183 Fed. 656;
Stern v. Mayer, 91 N. Y. Supp. 292;
Merritt v. Holliday, 95 N. Y. Supp. 331;
Cohen v. Small, 120 App. Div. 211 (affirmed 190 N. Y. 568);
Allen v. Gray, 201 N. Y. 504;
Spores v. Maude, 81 Ore. 11;
Boonville Natl. Bank v. Blakey, 166 Indiana 427; 76 N. E. 529.

The judgment roll in suit No. 341 shows a minute order dismissing the suit as to defendant, E. T.

Willey. (Tr. p. 61.) It is not an adjudication upon the merits. The order is one of dismissal or nonsuit only. That it was so intended appears from the language of the decree. (Tr. p. 64.) Such a dismissal is not, and does not purport to be, a determination on the merits. It is not a determination that plaintiff had no right to recover in any event against E. T. Willey, but that E. T. Willey had a legal defense, and plaintiff could not proceed in equity as against it. Such dismissal does not bar an action at law upon the same cause of action.

18 Corpus Juris, 1180;
18 Corpus Juris, 1201, 1207, 1208;
6 Enc., Pleading and Practice, p. 895;
6 Enc., Pleading and Practice, p. 986-988;
St. Romes v. Levee, etc., Co., 127 U. S. 614.
Harrison v. Remington Co. (C. C. A.), 140 Fed. 385;
Cramer v. Moore, 36 Ohio State, 347, 350;
Butchers' Assn. v. City of Boston, 137 Mass. 186;
Spores v. Maude, 81 Oregon 11.

In *Harrison v. Remington Co., supra,* the rule is stated:

> "Rulings and decisions in the course of an action which is finally dismissed without prejudice adjudge nothing, because the final judgment by its terms is that nothing has been adjudicated, and this fact is the only *res adjudicata.* Such a judgment determines that the parties are left as free to litigate every issue in the action dismissed as they would have been if it had never been commenced."

THE ACTION IS NOT BARRED BY ANY STATUTE OF LIMITATIONS.

Considering the fifth error assigned—The action was not barred by the provisions of the Code of Civil Procedure of California (Subd. 4, Sec. 338). The action is not governed by the California statute of limitations, but only by the statute of limitations provided by the Bankruptcy Act. The action is brought by the trustee under authority of Section 70, subdivisions (a) and (e) of the Bankruptcy Act. These provisions give the trustee the title to the money fraudulently transferred, and the right to recover it, and also the District Court as a court of bankruptcy as a forum having original jurisdiction of his action. His action is under the Bankruptcy Act, and is governed by the statute which gives it to him. It is governed as to the period of limitation by the provisions of that Act, and the trustee can proceed at any time provided by that Act.

Section 11 (d) of the Bankruptcy Act of 1898 provides:

> "Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed."

This section constitutes a new statute of limitations superseding all State and Federal statutes as to the suits to which it applies, and unless a suit was barred when the adjudication in bankruptcy was made, it is not barred until two years after the estate is closed.

The Bankruptcy Act of 1867 (R. S., Sec. 5057) provided:

> "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed."

This provision is construed and applied in *Bailey v. Glover,* 88 U. S. 342, in an action by an assignee to set aside fraudulent conveyance of the bankrupt. The court says (page 346):

> "This is a statute of limitation. It is precisely like other statutes of limitation, and applies to all judicial contentions between the assignee and other persons touching the property of the bankrupt transferred to or vested in the assignee."

This decision treats this provision as a Federal statute of limitation in bankruptcy matters, independent of State statutes. This provision of the Act of 1867 is also treated as a statute of limitation in suits by the trustee in the following cases:

Avery v. Cleary, 132 U. S. 604;
Jenkins v. International Bank, 106 U. S. 571;
Traer v. Clews, 115 U. S. 528;
Freelander v. Holloman, 9 N. B. R. 331; Fed. Cas. No. 5081.

In *Rock v. Dennett,* 155 Mass. 500, 30 N. E. 171, the Supreme Court of Massachusetts held that this provision controlled the State statute in an action

by the grantee of the assignee in bankruptcy against a transferee of the bankrupt's property.

Section 11 (d) of the Bankruptcy Act of 1898 corresponds to the provisions of Section 2 of the Act of 1867 in providing for limitations in suits by or against the trustee. Section 11 (d) extends the time until two years after the estate is closed. That the effect of Section 11 (d) is to exclusively govern actions by the trustee is established by the following authorities:

> "Suits may be commenced by the trustee upon any action that was not barred by limitation at the beginning of the bankruptcy, and may be so commenced at any time within two years after the closing of the estate, notwithstanding the State statute may bar the action before the two years have expired. In short, the Act creates a new statute of limitations, except as to actions already barred when the bankruptcy proceedings were instituted."
>
> *Remington on Bankruptcy,* Sec. 1791.

> "This sub-section has reference to suits by the trustee, rather than those pending at the time of the bankruptcy. It is similar to the corresponding clause under the Act of 1867 in the period only, two years. The time under the statute began to run when the cause of action accrued in or against the assignee. The time does not now begin to run until 'the estate has been closed'. This sub-section constitutes an arbitrary limitation on suits, as to computation of time at least superseding all statutes, whether state or federal, provided the action is not barred at the time the petition in bankruptcy was filed. It seems also that the character of the suit is immaterial, provided it amounts to the prosecution of a demand in a court of

justice, in respect to the property or rights of property of the bankrupt."

Collier on Bankruptcy, (11th Ed.) p. 307.

The Supreme Court of Georgia, in *Arnold Grocery Co. v. Shackleford,* 3 A. B. R. 119, 140 Ga. 585, in an action brought under Section 60 (b) by the trustee in bankruptcy, after the bar of the State statute was complete, held, after reviewing the Federal cases construing the provisions of Section 2 of the Act of 1867, that the Federal statute controlled and the action was not barred, the court saying:

"Section 11 (d) was manifestly intended to apply, among others, to cases falling under section 60 (b) of the Act, to the exclusion of any other statute of limitations."

The Supreme Court of Nebraska, in *Sheldon v. Parker,* 66 Neb. 610, 92 N. W. 923, 11 A. B. R. 152, in an action under Section 70 (e) to recover property fraudulently transferred, where the State statute was pleaded as a defense, held that the State statute did not apply, but that Section 11 (d) governed the action.

The court says:

"The filing of the petition in bankruptcy by Lewis C. Parker vested in the federal court complete jurisdiction over his estate. After that date no creditor could bring an action either to recover his debt or to subject property fraudulently conveyed to its payment. Such actions by operation of the bankruptcy law, are vested in the trustee of the bankrupt estate. As we have seen, by the provision of section

11 (d) of the Bankruptcy Act, the trustee has two years from the closing of the estate to bring an action. In *Freelander v. Holloman,* Fed. Cas. No. 5081, also reported in 9 N. B. R. 331, the question of the application of the statute of limitation was considered by the court. It is there said: 'The construction of the United States conferred upon Congress the power to establish a uniform system of bankruptcy throughout the United States; and when Congress in pursuance of this power, passed the Bankruptcy Act, it at once superseded all laws in conflict with it. The bankrupt's estate and right and everything connected with it, upon the bankruptcy, at once passed under the control and operation of the bankrupt law. After that the rights of those in interest may be contracted or enlarged, as Congress in its wisdom may provide. This provision in the second section, provides that all rights of action barred upon the appointment of the assignee shall remain barred, whether in favor or against the assignee, and give both to the assignees and those claiming an adverse interest to any property claimed by the assignee in adverse possession of others or claimed by others, to property in the hands or under the control of the assignee, two years in which to commence proceedings in equity or at law for its recovery. This is a separate and independent provision, and has no connection with any State Statute on the subject. It may extend or may contract the time provided in the statute of limitations. Thus if at the time of the appointment of the assignee but a few days remained of the time necessary to complete the bar, the time would be extended: or, if the statute has just commenced running, and under the State Law would have ten years to run, as in cases of actions of ejectment to recover real estate, it would be complete within two years.''

The defendant's theory that the action is barred by the State statute assumes that a trustee on acquiring the right to sue under Section 70 (e) acquires with it a creditor's notice of the fraud and is bound by such notice and limited to the same time for suit which the creditor would have if he sued independently of bankruptcy under State statutes to avoid a fraudulent transfer.

Now can it reasonably be the law that the trustee is deemed to have acquired the knowledge of any creditor or be bound thereby? The Bankruptcy Act gives the trustee the title to the property fraudulently transferred. When he sues to recover it he sues as the representative of all creditors. It may be that one creditor has knowledge of a fraudulent transfer. Should the knowledge of this one creditor bar the trustee from maintaining a suit for all creditors to recover the property, even though it be greatly in excess of this creditor's debt? Or, if the transfer was made in fraud of all creditors, should those of the creditors who had knowledge of the fraud be deprived of their share of money recovered in an action by the trustee, if the trustee base his freedom from the bar of limitation upon the want of notice to other creditors? Or, should the trustee in such suit be entitled to recover only such proportionate share of the property transferred as the debts due the creditors, who were without notice of fraud, bear to the whole of the bankrupt's debts,—a ratio plainly impossible to determine until all debts have been proved and adjudicated, at which time the action might be barred?

To answer any of these questions in the affirmative is absurd. Is it not clearly the intention of the Bankruptcy Act to put an end to all such difficulties by creating a new and independent statute of limitations exclusively governing all actions by or against a trustee? It is submitted that the authorities above cited under this head correctly interpret and apply the provisions of Section 11 (d) of that Act, and that under that section the present action cannot be barred by the State statute of limitations.

THE TRUSTEE AND THE CREDITOR, McGINN, DID NOT HAVE NOTICE OF THE FRAUDULENT TRANSFER.

Considering the fourth assignment of error—Assuming for argument's sake that the State statute of limitations controls this action, the notice to the plaintiff and the creditor, McGinn, was not sufficient to set the State statute in motion.

The notice claimed to put Edward McGinn upon inquiry as to the fraudulent nature of the transfer was acquired at the trial of an action by *E. T. Willey v. Sheriff Sweeney* to replevin or recover the value of an automobile sold by the sheriff on execution against C. F. Willey in the McGinn suit against him. The automobile had been levied upon when in the possession of Charles F. Willey. E. T. Willey testified that the machine was paid for by him by a check upon his own bank account, that the moneys in that account had been earned by him and deposited

by him at various times and that he bought the machine as his own and it remained his property. (Tr. pp. 37-39.) There is nothing in the record to contradict this testimony. The jury accepted it as true and gave their verdict for E. T. Willey. The only evidence presented in that case, upon which defendant now relies as giving notice of a fraudulent transfer, consisted in the statement (Tr. pp. 34, 35), where Mr. Burden testified that the account on which the check was drawn, which paid for the machine, was at one time transferred from an account of C. F. Willey. In levying on the machine the sheriff was seizing the apparent and presumed property of Charles F. Willey. There is nothing to suggest that at the time of levy Edward McGinn had suspected a fraudulent transfer, or had caused the levy to be made for such reason. No fraudulent transfer was involved in that suit, the only scrap of evidence relating to the subject of transfer merely indicated a transfer, with nothing to suggest fraud in connection with it.

Again, the trial of *Willey v. Sheriff Sweeney* took place in March, 1914. It appears that a new trial was granted, but it does not appear when the motion therefor was made or granted. It may well be that affidavits offered on the motion for new trial (their makers and their character do not appear) were not made until after the filing of the petition and the adjudication in bankruptcy, at which time all rights of Edward McGinn had terminated and those of the trustee commenced.

It is submitted that even though the trustee be limited by the State statute, there is no proof of notice of the fraud sufficient to set the statute in motion.

Plaintiff's counsel believe that the first and second assignments of error are for all purposes covered by and fully discussed in the discussion of the third, fourth and fifth assignments of error, and need not be separately treated.

It is respectfully submitted:

1. That the action is not barred by the decree or order in suit No. 341 in equity;

2. That the action is not governed by the California statute of limitations, but is governed as to limitations by Section 11 (d) of the Bankruptcy Act, and is therefore not barred;

3. That if governed by the California statute of limitations, such statute was not set in motion by notice to the creditor, McGinn, or to the trustee more than three years before the commencement of this action;

4. That the judgment must be reversed.

Dated, San Francisco,
February 14, 1921.

Respectfully submitted,
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